

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE DANIEL MELTON,

Defendant.

Cv. No. 05-1057-T/An
Cr. No. 03-10104-T

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Defendant George Daniel Melton, Bureau of Prisons inmate registration number 18735-076, an inmate at the Federal Correctional Institution ("FCI" Gilmer) in Glenville, West Virginia, filed a motion pursuant to 28 U.S.C. § 2255.

On December 15, 2003, a federal grand jury returned an eighteen-count indictment against Melton and eight codefendants. Melton was named in six counts of the indictment. On October 12, 2004, Melton pled guilty to Counts One and Five of the indictment, which charged him with conspiracy to distribute in excess of 50 grams of methamphetamine, a violation of 21 U.S.C. § 846, and using or carrying a firearm during a drug trafficking offense, a violation of 18 U.S.C. § 924(c).

On January 31, 2005, the Court conducted a sentencing hearing and imposed a sentence of two hundred forty months imprisonment on Count One and sixty months imprisonment on Count Five, to be served consecutively to the sentence imposed on Count One. The remaining counts of the indictment were dismissed upon motion of the government. Judgment was entered on February 3, 2005. Melton filed a notice of appeal on

February 10, 2005. Melton's direct appeal is pending before the Sixth Circuit. United States v. Melton, No. 05-5261.

The Sixth Circuit has adopted a per se rule that a district court may not consider a § 2255 motion while the prisoner's direct appeal is pending. See Capaldi v. Pontesso, 135 F.3d 1122, 1124 (6th Cir. 1998)(affirming denial of habeas relief to prisoner whose direct appeal is pending in the Fifth Circuit); see also Bowen v. Johnston, 306 U.S. 19, 26-27 (1939); United States v. Duhart, 511 F.2d 7, 8 (6th Cir. 1975); United States v. Davis, 604 F.2d 474 (7th Cir. 1979); Welsh v. United States, 404 F.2d 333 (5th Cir. 1968); Womack v. United States, 395 F.2d 630, 631 (D.C. Cir. 1968).

The motion, together with the files and record in this case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; see also Rule 4(b), Rules Governing Section 2255 Proceedings in the United States District Courts. Therefore, the court finds that a response is not required from the United States Attorney, and that the motion may be resolved without an evidentiary hearing. United States v. Johnson, 327 U.S. 106, 111 (1946); Baker v. United States, 781 F.2d 85, 92 (6th Cir. 1986). Defendant's motion is premature because his direct appeal is still pending and, therefore, his motion is DENIED.

Consideration must also be given to issues that may occur if the defendant files a notice of appeal. Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") only if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b); Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997) (district judges may issue certificates of appealability under the AEDPA). No § 2255 movant may appeal without this certificate.

In Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), the Supreme Court stated that § 2253 is a codification of the standard announced in Barefoot v. Estelle, 463 U.S. 880, 893

(1983), which requires a showing that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.”” Slack, 529 U.S. at 484 (quoting Barefoot, 463 U.S. at 893 & n.4).

The Supreme Court recently cautioned against undue limitations on the issuance of certificates of appealability:

[O]ur opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner “has already failed in that endeavor.”

Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (quoting Barefoot, 463 U.S. at 893). Thus,

[a] prisoner seeking a COA must prove “something more than the absence of frivolity” or the existence of mere “good faith” on his or her part. . . . We do not require petitioners to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. at 338 (quoting Barefoot, 463 U.S. at 893); see also id. at 342 (cautioning courts against conflating their analysis of the merits with the decision of whether to issue a COA; “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.”).¹

In this case, the defendant’s claims are clearly premature, and he cannot present a question of some substance about which reasonable jurists could differ. The court therefore DENIES a certificate of appealability.

¹ By the same token, the Supreme Court also emphasized that “[o]ur holding should not be misconstrued as directing that a COA always must issue.” Id. at 337. Instead, the COA requirement implements a system of “differential treatment of those appeals deserving of attention from those that plainly do not.” Id.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2255 motions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal in forma pauperis in a § 2255 case, and thereby avoid the \$255 appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). Kincade, 117 F.3d at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, the prisoner must file his motion to proceed in forma pauperis in the appellate court. See Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter is not taken in good faith, and leave to appeal in forma pauperis is DENIED. Accordingly, if movant files a notice of appeal, he must also pay the full \$255 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE